The Content and Context of Hate Speech

RETHINKING REGULATION AND RESPONSES

Edited by

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Interview with Robert Post

Peter Molnar: When I first came to the United States, a friend told me that the supposedly strong protection of freedom of speech in this country is simply a myth. Would you agree?

Robert Post: I suppose it would depend upon what one means by "myth." In certain communicative contexts – like the Internet, newspapers, magazines, or movies – constitutional protections for speech are quite robust. But in many other settings there is far less, if any, constitutional protection. So can we conclude that the reputation of a strong First Amendment is merely a myth?

PM: More narrowly, then: It is often stated that in the United States "hate speech"[1] is constitutionally immune from regulation. Is this correct?

RP: In many settings speech that is demeaning or degrading to particular minorities or genders or sexual orientations is regulated in the U.S. with few, if any, constitutional impediments. In private settings, for example, where there is no state action, constitutional restrictions do not apply. In such private settings hate speech can be regulated without constitutional constraint. There are also many public settings in which hate speech can be and is suppressed regularly and effectively. These tend to be settings in which the regulation of hate speech does not compromise public discourse.

PM: For example?

RP: In courtrooms, for example. Attorneys and judges will be penalized for hateful expression. So will teachers and students in public elementary and high schools,

[1] Peter Molnar explains why he places "hate speech" in quotation marks in "Responding to 'Hate Speech' with Art, Education, and the Imminent Danger Test," Chapter 10 herein, at n. 2.

This interview was conducted in New York City on October 29, 2009. Dean Post subsequently revised and expanded his remarks. Eds.

and even, in some contexts, in public universities. Prisoners, guards, and administrators will be regulated for hate speech in prisons, as will government employees in bureaucracies. There are lots and lots of settings in which in the United States government regulates or prohibits hate speech and First Amendment issues are not thought to arise.

This is an area in which conceptual precision is essential. First Amendment protections attach to speech acts, not to speech per se. The identity of a speech act is in part determined by its context. The same vile words, epithets, and concepts can therefore in different contexts be constitutionally conceptualized as entirely different kinds of speech acts and in consequence receive entirely different degrees of constitutional protection.

Speech acts that comprise "public discourse" – speech acts that we recognize as appropriate ways to influence the formation of public opinion – receive what we ordinarily conceive as the full measure of First Amendment protection. Hate speech that is part of public discourse will receive the same protection that public discourse generally receives. Hate speech that is not part of public discourse will not receive this kind of protection. So, for example, hateful words addressed by one employee to another in the context of employment within the Social Security Administration will receive only the minimal forms of constitutional protection that we accord to speech expressed by employees in the context of government employment about matters of private concern.

Because First Amendment protections depend on how a speech act is classified, and because "hate speech" is not in the United States itself recognized as a distinct constitutional category of speech act, it is never clear what circumstances people have in mind when they speak of the regulation of hate speech in the United States. Typically the claim that hate speech is constitutionally immune from regulation imagines hateful communications within public discourse, like expression in newspapers. Such speech does indeed tend to be protected from regulation. But because speech uttered in the workplace is not typically classified as public discourse, hate speech expressed in such a context is routinely suppressed.

PM: So how do we distinguish between those parts of the public sphere that comprise public discourse as you define it and those that do not?

RP: The concept of the "public sphere" is a sociological one. It refers to a sociological formation created by the circulation of texts. It typically comes into being when persons seek access to common facts and common information, and typically for some common purpose. There is a large and complicated literature, and much disagreement, on what the public sphere entails.[2] When I use the term "public discourse," by contrast, I am using it stipulatively to refer to those forms of communication which in our society are viewed as necessary to the processes by which public opinion is formed. We believe that such processes must be left relatively unregulated and that persons participating in such processes must be regarded by the law as autonomous and self-determining.[3] We believe that the legitimacy of our democracy depends upon these principles. Public opinion is formed within the public sphere, but which forms of communication are included within public discourse and which are not is ultimately a normative constitutional question.[4]

The distinction between public discourse and the public sphere can be seen in courtroom speech. The speech of the attorneys in the courtroom in a political trial no doubt forms part of the *public sphere*. Yet attorney speech within a courtroom is routinely and extensively regulated. Attorneys are regarded as officers of the court, not as autonomous private citizens. Attorney speech is therefore pervasively controlled by rules of evidence, rules of procedure and decorum, and so on. No judge would allow attorney speech to degenerate into racist diatribes, because such diatribes would undermine the organizational objective of a court to achieve justice. Attorney speech in a political trial would be part of the "public sphere" but it would not for normative constitutional purposes be regarded as "public discourse."

A more complicated example is radio and television broadcasting. Such broadcasting is certainly constitutive of the public sphere, but in the United States countervailing considerations prevent broadcasting from being unequivocally categorized as public discourse. Broadcasting represents a hybrid case, which is in some ways free and unregulated, and in many ways highly regulated. The categorization of broadcasting is a question of deep confusion within American constitutional law.[5] We do not permit mere indecency to be suppressed in public discourse, but we do permit its censorship within broadcasting. The Internet, by contrast, cannot be regulated in this way.

PM: It seems that in the United States much of the regulation of "hate speech" in the public sphere (though not the public discourse) has been done not by the state but by other organizations. Examples would include university speech codes.[6]

RP: One needs to distinguish various dimensions of the public sphere. There are aspects of the public sphere, like the courtroom example, which involve what I

[2] *See, e.g.*, Jurgen Habermas, "The Public Sphere: An Encyclopedia Article," in *Media and Cultural Studies: Key Works* 102 (Meenakshi Gigi Durham & Douglas M. Kellner eds., Wiley-Blackwell 2001); Nancy Fraser, "Rethinking the Public Sphere," 25/26 *Social Text* 56 (1990).

[3] Robert Post, "Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse," 64 *U. Colorado L. Rev.* 1109 (1993); Robert Post, "Democracy and Equality," 1 *Law, Culture and the Humanities* 142 (2005), *republished in* 603 *Annals Amer. Acad. Political Soc. Science* 24 (2006).

[4] I discuss some of the enormously complicated considerations that form part of this normative question in Robert Post, "The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and *Hustler Magazine v. Falwell*," 103 *Harv. L. Rev.* 601 (1990).

[5] *See* Robert Post, "Subsidized Speech," 106 *Yale L.J.* 151 (1996).

[6] *See generally* Arthur Jacobson and Bernhard Schlink, "Hate Speech and Self-Restraint," Chapter 12 herein.

have elsewhere called managerial domains. A managerial domain is an institution created to accomplish a specific function, to achieve a particular goal. The goal of a courtroom is to produce justice. The function of a university is to dispense education and to produce knowledge. Once a bounded institution exists that is oriented toward a specific mission, the institution will regulate persons within its domain in ways necessary successfully to achieve its function. And this implies that the institution will also regulate the speech of persons within its domain as is necessary to be instrumentally effective.[7] The constitutional rationale of public discourse is precisely the opposite of that of a managerial domain. The objective of the latter is to achieve its purposes; the objective of public discourse is to determine what our purposes are. Within public discourse, goals must perennially be taken as provisional and revisable.

PM: Control of "hate speech" in these "managerial settings" does not exhaust the instances of actual regulation in the United States. For example, Jacobson and Schlink point to two others: regulation of employers, making them liable for harassing speech by their employees, and the self-regulation of the broadcast and cable industries.[8] How do these latter contexts fit within your conceptual schema?

RP: With regard to workplace regulation, writers such as Cynthia Estlund contend that workplace speech should be considered part of public discourse, that is to say it should be considered part of public-opinion formation.[9] The proposition is serious and debatable, but it is clear that it does not represent the current normative perspective of the contemporary American legal system. Title VII[10] places significant restrictions on workplace speech which creates a hostile environment,[11] and courts do not evidence any serious inclination to use the First Amendment to restrict these aspects of Title VII.[12]

The situation with regard to broadcasters is very different. Self-regulation by broadcasters is a response to the threat of regulation by the Federal Communications

[7] For the general theory of this point, see Robert Post, "Between Governance and Management: The History and Theory of the Public Forum," 34 *UCLA L. Rev.* 1713 (1987). For an elaboration of the point in the specific context of university speech codes, see Robert C. Post, "Racist Speech, Democracy, and the First Amendment," 32 *Wm. & Mary L. Rev.* 267, 317–25 (1991).

[8] Jacobson and Schlink, *supra* note 6.

[9] *See, e.g.*, Cynthia Estlund, "Harmonizing Work and Citizenship: A Due Process Solution to a First Amendment Problem," 2006 *S. Ct. Rev.* 115 (criticizing the Supreme Court for underprotecting public employees' free speech rights and undervaluing the public interest in hearing what they have to say); Cynthia L. Estlund, "The Workplace in a Racially Diverse Society: Preliminary Thoughts on the Role of Labor and Employment Law," 1 *U. Pa. J. Labor & Empl. L.* 49, 73 (1998) (describing "the workplace as a uniquely valuable setting for speech and as an important satellite forum for public discourse").

[10] Title VII of the Civil Rights Act of 1964, codified at 42 U.S.C. § 2000e.

[11] *See* Jacobson and Schlink, *supra* note 6.

[12] Arguments that Title VII does violate the First Amendment have been made, generally by scholars with very different politics than Estlund's. *See, e.g.*, Kingsley Browne, "Zero Tolerance for the First Amendment: Title VII's Regulation of Employee Speech," 27 *Ohio N.U. L. Rev.* 563 (2001). For cites to the literature, see *id.* at 576 n. 77.

Commission (FCC). American constitutional law currently accepts a number of distinct rationales for regulating the content of broadcasting, most especially for prohibiting the broadcast of indecent speech during certain hours of the day when children are likely to be in the audience. One traditional justification concerned spectrum scarcity;[13] in these days of the Internet and of a virtually infinite number of cable channels, that rationale has become less and less convincing. The justification that presently retains pride of place is the one offered in the *Pacifica* case,[14] in which the Court reasoned, roughly, that because broadcasting is a powerful method of socializing the young, it is necessary to regulate broadcasting to ensure that its intrusion into the home does not disrupt the transmission of essential community values from parents to children. Any such disruption would undermine the very decency and civility that public discourse in a democracy requires to fulfill its function of democratic legitimation.[15]

PM: So you read *Pacifica* to permit limits not only on indecency but also on some sorts of "hate speech"? If so, is it a special limitation on broadcast "hate speech," an exception from what you call "the paradox of public discourse," that there seems to be no way for the state under the prevailing interpretation of the First Amendment to uphold civility rules in public discourse, although a minimum of civility rules might seem to be necessary for public discourse to function properly?

RP: This is currently a matter of constitutional speculation, but my guess is that if the FCC imposed on broadcast television the kind of regulations that Jeremy Waldron is talking about – limitations designed to provide members of vulnerable groups the "assurance" necessary to go about their lives in a secure and dignified manner[16] – and these limitations were defined in a suitably precise and limited way, those regulations would be upheld by the courts. But that's merely a prediction. Such a conclusion would be consistent with the rationale of *Pacifica*. Of course, a court that disagreed with *Pacifica* might reach a different conclusion about the extent to which enforcement of community norms might be necessary to sustain the function of public discourse.

The Internet, in contrast to broadcasting, is understood to be a medium of communication in which adults can control the participation of children by filters and other devices, so that adult communication on the Internet cannot be regulated to make it appropriate for the socialization of children.[17] The Internet is therefore for constitutional purposes analogous to media such as newspapers and movies. *Pacifica*'s justification for content regulation, which sounds in the socialization of children, drops out of the picture.

[13] *See, e.g.*, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 388–91 (1969).

[14] FCC v. Pacifica Foundation, 438 U.S. 726 (1978).

[15] Robert Post, "Community and the First Amendment," 29 *Ariz. St. L.J.* 473 (1997).

[16] See Jeremy Waldron, "Hate Speech and Political Legitimacy," Chapter 16 herein.

[17] Reno v. American Civil Liberties Union, 521 U.S. 844 (1997).

PM: In your previous work, notably your book *Constitutional Domains*,[18] you have distinguished the model of democratic self-government, in which "autonomous wills" are coordinated and reconciled, from the form of social organization that you label "community." Public discourse may operate very differently, and be subject to very different regulation, in these two settings. Could you explain the tension between democracy and community and how they can be reconciled?

RP: The scope and nature of public discourse depends upon the scope and nature of what is "public." In my work, I contrast the social formation of the "public" with the social formation of what I call "community."

I define "community" as a social structure that inculcates common norms into the identities of its members.[19] Only feral children grow up outside communities. Normal human beings, as George Herbert Mead explained, are raised in a community that socializes them into its norms. All normal human beings "internalize" these norms, so that they become part of the structure of their personality.[20] Normal human beings know how to treat other human beings within their culture, how to distinguish friends from enemies, how to evince respect and contempt, and so on. The same norms that are powerfully built into the structure of individual personalities are also powerfully built into the collective identity of the community, so that there is a continuous symmetry between collective and individual identity. I use the term "community" to refer to this deep and inevitable form of social solidarity in which ongoing processes of socialization ensure that social norms reciprocally define individual and collective identity. Building on Mead's work, I think of community as a primal and indispensable form of social organization. It creates identities; it creates values; it creates structures of attitudes and motivations; it creates social solidarity and unity that allows for group identification, and so on.

The social formation of the "public" is not at all like this. The public is a space that encompasses many communities. This idea was developed in America through sociologists, particularly at the University of Chicago in the early years of the twentieth century, who were studying major urban metropolitan areas in which there were many distinct communities.[21] Take the complex and diverse city of Chicago. It encompassed neighborhoods in which persons congregated from distinct communities, from Italy, Poland, Slovakia, neighborhoods in which there lived primarily Jews, or African Americans, or White Anglo-Saxon Protestants (WASPs), and so on. Each of these distinct communities possessed a unique identity, a particular form of social solidarity based on particular customs, traditions, histories, and norms. Yet these various neighborhoods somehow had to come together to govern the common

[18] Robert C. Post, *Constitutional Domains: Democracy, Community, Management* (Harvard University Press 1995).

[19] *Id.* at 300.

[20] Robert Post, "Between Democracy and Community: The Legal Constitution of Social Form," in *Nomos XXXV: Democratic Community* 163 (John W. Chapman & Ian Shapiro eds., NYU Press 1993).

[21] *See* Post, *supra* note 3.

metropolitan area of Chicago, which was a vast space that embraced many diverse communities. The common space of what I call the "public" is that into which persons enter as they leave their insular neighborhoods and communities and seek to work together with those who have been socialized into distinct norms. Because we are a multicultural nation, we have been forced in the United States to forge a healthy public space in which persons from diverse neighborhoods can meet each other, on terms of equality and mutual respect, *outside* of their respective communities. Of course the public space would be neither safe nor equal if persons entering it would automatically be subject to the norms of an alien community.

As the need for a safe and neutral public space became increasingly apparent in the third decade of the twentieth century, which is to say as WASP dominance of the public sphere that had heretofore been accepted as natural began to weaken, we developed in the United States a First Amendment doctrine designed to ensure that the state would remain neutral with respect to the enforcement of community norms within public discourse, which is to say within those forms of speech necessary for the common project of democratic self-governance. The First Amendment sought to ensure that public discourse was safe and welcoming to all individuals; it refrained from suppressing speech that might be inconsistent with the norms of any particular community. The First Amendment ensured not merely a marketplace of ideas, but also a marketplace of communities.

The key case in this development was *Cantwell v. Connecticut*,[22] which interpreted the First Amendment to hold that in public discourse we meet each other as equal persons who are immune from the condemnation that might be imposed by the norms of an alien community. Even if communicating according to the norms of a speaker's own community profoundly insults and demeans another, because the community norms of an addressee regard such communication as offensive and degrading, the First Amendment will nevertheless typically prohibit the law from enforcing the community norms of an addressee.

Our unique separation of church and state is a good example of the way in which we have interpreted our Constitution to ensure a public space that remains permanently outside the domain of any single community. The Establishment Clause does not prohibit the establishment of religion because we are an irreligious nation. To the contrary, we are the most religious of all modern developed nations. We instead prohibited the establishment of religion because religion was so important to Americans in the eighteenth century and because they understood that they were so religiously diverse. Each sect was afraid that it would come under the control of another, alien sect. They therefore agreed that *no sect* would be able to seize control of the common resources of the federal government. The Establishment Clause guaranteed that the federal government would remain neutral ground, and hence

[22] 310 U.S. 296 (1940) (setting aside breach of the peace convictions of Jehovah's Witnesses proselytizing on the sidewalk).

that religious practices could safely remain voluntary and privatized with respect to federal control.

Norms of civility, by which we distinguish speech that is hateful from all other forms of speech, are like the tenets of a religion. Different communities have different norms of civility, and hence they classify different forms of speech as hateful. In the 1940s, when the notion of public discourse was being constructed by our Supreme Court, multiple communities were seen as vying for control of the public space. The upstanding decent people on the right side of the tracks wanted to prohibit one form of one discourse, whereas the working classes wanted to ban a different kind of discourse, and the churches wanted to suppress yet a third form of discourse. Which form of civility would the law impose to control public discourse? The Court's answer was that no form of civility could be imposed.

Precisely because in the United States community was fragmented, precisely because there was deep, sincere, and divisive disagreement about the forms of speech that should be prohibited as hateful, the Court adopted a rule that was analogous to the Establishment Clause. It said that *no* community could seize the power of the state to impose its own norms on public discourse. That is the true meaning of such reiterated but fundamentally odd Supreme Court maxims as "one man's vulgarity is another's lyric,"[23] or "one man's amusement teaches another's doctrine."[24] The Court is not really advocating a kind of hopeless relativism. In many contexts the law distinguishes vulgarities from lyrics, amusements from doctrines. These distinctions, however, turn on community norms, and what such maxims really mean is the First Amendment will not permit such norms to be enforced within public discourse.

Underlying this marketplace of communities is one additional and important qualification. Karl Polanyi once argued that any marketplace must be "embedded" in a larger community.[25] That principle also applies to the marketplace of communities. If one is going to tolerate different forms of speech, that toleration itself must reflect an image of the public good; it must reflect a particular normative image of the good state that is democratically responsive to the public opinion of its citizens. Absent such an image, public discourse cannot perform its allotted function of underwriting democratic legitimacy. So without an image of a state like, say, Hungary, an image of a social order that is larger and more encompassing than any single particular community within Hungary, there is no reason for particular Hungarians to leave their own particular communities to participate with strangers to make a public opinion that will direct the larger Hungarian state. There is no reason to tolerate alien communities at all. One can see here that the whole idea of democratic self-governance is itself a community norm that must be sustained through typical forms of community socialization, including specifically democratic

[23] Cohen v. California, 403 U.S. 15, 25 (1971).

[24] Winters v. New York, 333 U.S. 507, 510 (1948).

[25] *See generally* Karl Polanyi, *The Great Transformation* (Farrar & Rinehart 1944).

education. And this, in turn, means that if the toleration of incivility fundamentally threatens the community norms that sustain democracy itself, then the logic I have been explicating no longer applies.

In the United States, therefore, courts always face a dilemma. With respect to any particular government regulation enforcing a civility rule within public discourse, it can be argued either that enforcement of the civility rule is necessary to sustain the community life of the nation, so that striking down the regulation would ultimately undermine democratic self-governance, or that, to the contrary, the enforcement of the civility rule violates the tolerance required by democratic self-determination, so that allowing the regulation needlessly displaces and therefore damages democratic self-governance. One sees this dilemma endlessly reiterated within American jurisprudence.

PM: Do you think this model can work only in the United States?

RP: Habermas argues that it can work in Europe. Habermas's idea of "constitutional patriotism" is quite relevant to what I have been saying.[26] Habermas believes that one can have loyalty to an entity that is defined by inclusiveness and difference. He initially based his notion of constitutional patriotism on the United States, which at one point he considered an appropriate model for Europe.

PM: Your model seems to have both a normative and a descriptive/cultural element. The normative element requires that the state respect the authorship of everyone in the public discourse; the cultural/descriptive element holds that everyone accepts that others might have different views about civility rules in the public discourse but that in the background there is something common that holds people together in some shared enterprise.

RP: That's right; there is some *unit* that defines public discourse. If we protect public discourse so that we might engage in "self-government," we must first ask who the "self" is that seeks to govern. If we answer "the people," then we must join with Rousseau, who properly observes that we must first "examine into that by which a people became a people; for, on this . . . rests the true foundation of society."[27] However we define "the people" who have thrown themselves together into the common enterprise of self-government through the perpetual formation of public opinion, the success of democratic self-government requires that the unit we define must

[26] *See* Jurgen Habermas, "Struggles for Recognition in the Democratic Constitutional State," in Jorgen Habermas, *The Inclusion of the Other: Studies in Political Theory* 225–6, 203–36 (Ciaran Cronin & Pablo DeGreiff eds., Ciaran Cronin trans., MIT Press 1998). Frank Michelman describes "constitutional patriotism" as naming "a motivational disposition . . . of attachment to one's country, specifically in view of a certain spirit sustained by the country's people and their leaders in debating and deciding disagreements of essential constitutional import." Frank Michelman, "Morality, Identity, and 'Constitutional Patriotism'," 76 *Denv. U.L. Rev.* 1009, 1022 (1999).

[27] Jean-Jacques Rousseau, *A Treatise on the Social Compact, Or, the Principles of Political Law* 18 (J. Murray 1791).

necessarily share a common commitment to, at a minimum, the community norm of self-determination as the proper form of social solidarity. The implication is that democracy is always founded on some larger notion of an encompassing community that creates the public and that requires common collective authorship.[28] Without this normative premise, I think it will be very hard to construct a coherent concept of freedom of speech. Somehow the preconditions for loyalty and tolerance must be constructed on the basis of antecedent forms of social solidarity, on some form of community.

PM: Do you mean that this normative premise provides a precondition for Hungary or Central European and Eastern European countries generally if they want to construct a coherent concept of freedom of speech, and that countries in which the cultural elements that you described are missing are not, or cannot be, legitimate democracies?

RP: I don't know. I don't know enough about what it is like to live in a democracy like Russia or Hungary. Do citizens there experience authorship? Or do they feel oppressed no matter what party is in power? In my country, George W. Bush was in power for eight years and he did many things I abhorred. Nevertheless, I did not and could not refuse to accept an identification with my government. My loyalty transcends the particular actions of a particular party, however much I disagree with the actions it may be taking. My relationship to my government is based upon a larger time horizon than the Bush presidency. Does that larger time horizon exist in Russia or Hungary? If it does, then you have the resources to construct a real democracy.

PM: How might a country go about developing the two cultural elements of loyalty and tolerance if they are meager or underdeveloped?

RP: I think that an important resource is collective memory. There has to be a continuous story of national development and ideals. In this country, our tradition of freedom of speech is itself an essential collective memory that inspires loyalty and tolerance. And I suspect the same would be true for many European countries. If they don't have such a story, if they don't have the resources for collective memory – and this is István Rév's point about Hungary[29] – it will be very difficult to create the normative resources for public discourse and the marketplace of communities. Without some larger community value, nothing will constrain the exercise of raw power, which frequently does not experience the need to be either tolerant or loyal.

Another way of saying this is that in the United States we believe that even the positive enactments of the state are ultimately accountable to the most deeply held norms of the community that underwrites the state. This is the area of our

[28] See Robert Post, "Democracy, Popular Sovereignty, and Judicial Review," 86 *Cal. L. Rev.* 429 (1998).
[29] István Rév, *Retroactive Justice: Pre-History of Post-Communism* (Stanford University Press 2005).

doctrine we call substantive due process, which constrains state action on the basis of fundamental traditions and values.

PM: At the gay pride parade in Budapest in 2009 (a topic to which I will return), the government protected the marchers very professionally. That shows both an ability and a certain political commitment to do so, indicating that the cultural element of tolerance is developing in Hungary.

RP: The example would be powerful if the government were acting to demonstrate toleration for speech with which it radically disagreed. Holmes put this most dramatically when he said that the true test of guarantees of freedom of speech turns on "freedom for the thought that we hate."[30] But note that such tolerance cannot be only for progressive causes. There must be tolerance for speech hated by the left as well as speech hated by the right.

PM: Yes, obviously.

RP: Not obviously.

PM: For many people not obviously.

RP: There are many who would construct asymmetries between the toleration of the left and the right. In fact we heard this position articulated in our symposium.[31]

PM: I wonder how complete this model of unregulated discourse between competing communities is. Suppose community A has civility rules under which members are not only free to engage in anti-gay speech, for example, but even required to do so, whereas community B, in this example, a gay community, has a norm of respecting the freedom of speech even of community A, which is engaging in "hate speech" aimed directly at community B. Then it is not really a fair fight. Can the state intervene in such circumstances?

RP: Once again, it is important to avoid a picture in which the state either acts in an aggressive and intolerant way or is paralyzed and cannot act at all. In the United States, as I mentioned, the regulation of speech is quite fragmented and discontinuous. The government can intervene in some contexts, but not in others. In the workplace, rules against anti-gay speech are permissible. So communities are not in this sense equal in the workplace; we permit the suppression of some forms of uncivil speech. But public discourse is a limited and specialized form of communication in which communities must politically be regarded as equal. The reason why we impose such odd rules on public discourse is that it is the precise location in which the "self" in "self-government" is created. It is the location in

[30] United States v. Schwimmer, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting).
[31] Post is referring here to an international workshop on "hate speech," organized by Jeremy Waldron, that took place at NYU Law School on October 23–24, 2009. Eds.

which we collectively decide what is and what is not fundamental. And if that question is already decided and imposed upon public discourse, then we lose the capacity collectively to think through the problem. That is why the state cannot intervene to tip the scales within public discourse.

Notice also, however, that even though we prevent the state from regulating public discourse in the name of a community norm, we nevertheless freely allow the state to participate within public discourse as a speaker. The state is a frequent, powerful, and loud participant in public discourse. We respect a president who stands up and asserts we should treat each other with civility and respect and that we should raise the tone of public conversation.[32]

PM: I have heard you elsewhere mention the example of the U.S. government expressing support for civil rights by issuing a commemorative stamp in honor of Martin Luther King. That's also forceful speech.

RP: Precisely so.

PM: But in the public discourse, under the prevailing First Amendment model, special protection of certain groups is not possible.

RP: For speech purposes. The state can adopt affirmative action programs; it can regulate conduct in many ways. But as a general matter the First Amendment prevents the state from restricting what people do and do not *say* in public discourse, although this generalization has exceptions. There are limits that the Court has found it necessary to impose. The way I conceptualize those limits is that the social form of community is logically and sociologically prior to that of democracy. So if incivilities occurring in public discourse threaten to undermine the very idea of a democratic community, if they threaten to undermine the norms of civility that allow public discourse to serve its function, the Court will permit regulation. But what is permissible will be a very thin form of regulation at the margins, and we will characterize unprotected speech with labels like fighting words,[33] or "true threats,"[34] or incitement to imminent violence.[35] These are marginal cases, but they do definitely exist, and they teach us an important lesson. They stand for the proposition that the Court will allow the maximum possible degree of freedom that is

[32] For two strikingly direct governmental condemnations of what most would characterize as hate speech, see the statements approved by the houses of the U.S. Congress in 1994 condemning a November 1993 speech by Khalid Muhammad of the Nation of Islam at Kean College in New Jersey. H.R. Res. 343, 103d Cong., 2d Sess. (1994) (condemning the speech as "outrageous hatemongering of the most vicious and vile kind"); 140 *Cong. Rec.* S687 (February 2, 1994) (adopting by a vote of 97–0 an amendment expressing the sense of the Senate that the speech "was false, anti-Semitic, racist, divisive, repugnant and a disservice to all Americans and is therefore condemned").

[33] *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[34] *See* Virginia v. Black, 538 U.S. 343 (2003); R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992); Watts v. United States, 394 U.S. 705 (1969).

[35] *See* Brandenburg v. Ohio, 395 U.S. 444 (1969).

compatible with the survival of the democratic community.[36] So not even in public discourse is there anything like "absolute protection." Not even close.

PM: The examples you give all turn on the context of the speech.

RP: Most fundamentally, they turn on the legal characterization of the speech act at issue. Courts typically ask whether a particular speech act constitutes an effort to participate in public opinion formation, or whether it instead is really a threat, or a fight, or an incitement to immediate illegal action. These characterizations are intuitive and pre-theoretical, and, as you say, they are very influenced by context. Many of the most basic First Amendment judgments turn on such pre-theoretical acts of classification.

Here's an example. As I have mentioned, there is an essential difference between state regulation of speech within a managerial domain and within public discourse. But if a soldier in a military barracks is writing his Senator complaining about his commanding officer, should the speech act be classified as within the managerial domain of the military, in which case it can be punished because inconsistent with the discipline required for the effective functioning of the military, or should it be classified as the public discourse of a citizen petitioning his government? This is a normative question, and it is the kind of pre-theoretical determination that is constantly made and continuously underlies First Amendment doctrine. If speech is within the managerial domain of the military, it can be regulated as hate speech. Hate speech between soldiers can be and is suppressed insofar as it is inconsistent with the mission of the military. When such speech is within public discourse, by contrast, it is relatively immune from state regulation. Often hard cases within public discourse are handled by courts classifying speech as outside public discourse.

PM: Do you mean to imply that democracies must allow people to engage in "hate speech" so long as "hate speech" is expressed within the public discourse, otherwise they undermine their legitimacy regardless their cultural context?

RP: I was surprised at a recent conference[37] to hear several speakers say that each country should regulate hate speech in its own way. This is not the usual way in which I have heard this question discussed, which tends to be in a universalist register. It is argued that hate speech either does or does not come within a universal right to freedom of speech, and hence it is either suppressible in every state or in no state. This cosmopolitan approach is consonant with a highly internationalist doctrine of human rights that extend universally around the globe. The thought that hate speech may be constitutionally protected in one country but not in another seems inconsistent with a global vision of rights.

[36] On the concept of "democratic community," see Post, *supra* note 2.

[37] Post is referring to a conference based on the contributions to this book which took place at the Cardozo School of Law on May 13, 2010. Eds.

My own view, I should hasten to say, is highly contextualist. I believe that "A" can be a right in country "B" but not country "C" if the history, customs, traditions, and political circumstances of the two countries are relevantly different. Until this conference, I have always considered myself as something of an outlier for taking this view.

I rest my own contextualism on the conclusion that it does not make much sense to speak of a right of freedom of speech *simpliciter*. To speak of a simple right to speech, one would have to be able to distinguish speech from action. But no such distinction exists, because all words are also deeds. "Speech" and "action" are not distinct natural categories that exist in the world. Instead we determine the reasons why we wish to protect speech, and we then classify as speech those transactions that serve these reasons. The fundamental question for us is therefore what purposes we wish to serve by protecting speech. This is the way, for example, Fred Schauer talked about freedom of speech in his 1982 book,[38] which set the modern agenda for thinking about First Amendment jurisprudence.

For a variety of reasons I will not go into now, I do not think that the search for truth is particularly helpful in defining which speech acts are protected.[39] Nor do I think, even though the late great Ed Baker would have disagreed,[4] that the value of autonomy is particularly helpful as a guide to protecting speech, because it is too vague and broad-gauged. What seems to me most useful in describing the actual shape of constitutional protections throughout the world, not just in the United States, is the thought that we protect freedom of speech because we believe that certain kinds of communications must be free if democracy is so succeed as a form of governance.

Roughly speaking, the thought is that democracy rests on the value of self-governance. It must mediate between individual and collective autonomy. We do this through the medium of public opinion. Public discourse is the technical legal term used to describe the speech acts necessary for public opinion to mediate between individual and collective autonomy. In a culturally heterogeneous society, free participation in public discourse is a necessary but not sufficient condition for my faith that my government can be responsive to my beliefs. We reinforce this faith with a wide range of institutions, ranging from elections to juries, designed to tether the state to public opinion. This suggests that the right to freedom of speech is logically and sociologically dependent on an anterior right to democratic participation

[38] Frederick Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge University Press 1982)

[39] For a general discussion, see Robert Post, "Reconciling Theory and Doctrine in First Amendment Jurisprudence," 88 *Cal. L. Rev.* 2353 (2000)

[4] In his chapter in the current volume, Baker rests his skepticism regarding regulation of hate speech on two propositions that are central to much of his writing about freedom of speech: that the legitimacy of the state depends on its respect for people's equality and autonomy, and that, as a purely formal matter, the state only respects people's autonomy if it allows them to express their own values in their [illegible] "Hate Speech," Chapter 3 herein.

or self-rule. This turn suggests that international human rights instruments have it conceptually backward.

If there is a right to participate in the formation of public opinion, that right exists to make the state more democratically legitimate. This creates something of a paradox. The content of this right is exquisitely contextual, because which forms of speech will and will not make the state more democratically legitimate is in part an historical question. Yet the right is also formal, because it extends equally to all who are subject to democratic rule.

It could be that participation in opinion formation in certain ways, in certain countries, in certain national contexts, destabilizes democracy rather than legitimizes it. Legitimacy is a contingent historical condition. The right of participation is a formal universal right. The two therefore fit uneasily together. The formal right exists so long as it serves the contextual value. That is why, at root, one might adopt a contextualist position about the regulation of hate speech. In some contexts, hate speech might so delegitimize democracy as to justify excluding hate speech from the formal definition of freedom of speech; in other contexts, excluding hate speech from the right of freedom of expression would constitute a paradigmatic example of censorship. It all depends.

As a formal matter, we can say that suppressing hate speech in public discourse contradicts the formal right of participation. It prevents persons from participating in a process of public-opinion formation in ways that would make the law responsive to them. With respect to such persons, the state has *pro tanto* ceased to be legitimated, because it has excluded them from the process of public-opinion formation. There is thus always a steep cost to prohibiting the participation in public discourse of those who wish to engage in hate speech. The default rule should therefore be that hate speech should not be excluded from public discourse. But there is another side to the question. It could be that the costs of hate speech to the overall democratic legitimation of the nation are so high that the default rule should be overturned. This is a matter of particular historical contingencies and circumstances.

PM: Your discussion of public discourse offers one test of legitimacy: the results of the democratic process are legitimate only if all communities have participated in the discourse that produces the relevant consensus or decision. That in turn disables the state from proscribing certain messages, including "hate speech." Julie Suk provides a different account with regard to France, arguing that after World War II, the very legitimacy of the republic required outlawing racist speech and Holocaust denial.[41]

RP: I can't speak to the particular historical claims that Julie makes. I know that Patrick Weil has offered an analogous account. In the abstract, of course, we can

[41] Julie C. Suk, "Denying Experience: Holocaust Denial and the Free-Speech Theory of the State," Chapter 8 herein

say that to the extent that a state firmly commits to a particular identity, so much so that it prohibits persons from thinking or communicating about any other identity, then it *pro tanto* ceases to be a democratic state because it refuses to be responsive to what its citizens are actually thinking and so withdraws from the project of self-governance. Julie has contrasted the French state's refusal to be neutral with the impotence of the American state, which she regards as effectively paralyzed by a misconceived commitment to neutrality that is mandated by the First Amendment. For the reasons I've already discussed, I think this contrast is overdrawn. The First Amendment prohibits content discrimination in the civil and criminal regulation of public discourse. But as a general matter, the American state is far from neutral. The American state takes substantive positions all the time. It affirms civil rights, equality, toleration, and so forth. Consider our regulation of workplace actions and speech. Consider our stamps and monuments. Consider the ongoing expression of American government officials about issues of race and toleration. Consider the rules and regulations that the American state imposes on the army, on government institutions, on contractors, and so on. No one should confuse the American state with a neutral state. What is true is that the American state will not regulate public discourse through civil or criminal sanctions in ways that are based on content. So the contrast between us and the French is actually much smaller than I think Julie implies.

PM: So to ensure legitimacy and self-government, the government cannot intervene in the public discourse – through civil or criminal sanctions in ways that are based on content – other than in exceptional situations.

RP: It can and does intervene in public discourse in the sense that the government itself *speaks* in public discourse. But you are correct that a concern with democratic legitimation prevents it from using civil and criminal sanctions to regulate public discourse except in very unusual situations.

PM: All right. And what about the claim that another way for the state to achieve legitimacy is by excluding certain messages from the public discourse?

RP: Jeremy Waldron makes an analogous point. For him, democratic legitimacy does not require including in public discourse attacks on accepted "fundamentals" as to which there is no longer a meaningful, ongoing debate. Jeremy's position presupposes that we agree about the fundamentals; that they are not controversial. In his model, something like in the old picture of Patrick Devlin,[42] the legitimacy of the state depends upon enforcing what we already all agree upon.[43] Such a position would have much to recommend it if in fact there was universal agreement about what was "fundamental." But, as in Devlin's case, those who advocate for

[42] Patrick Devlin, *The Enforcement of Morals* 10 (Oxford University Press 1965).

[43] *See* Waldron, *supra* note 16.

the enforcement of fundamentals are most apparently attempting to discredit and exclude those who precisely disagree with their view of fundamental values. In the context of hate speech, we are by hypothesis addressing a situation in which many persons deny "fundamental" principles and wish to speak in ways that are inconsistent with them. This suggests to me that in fact we do not all agree on such fundamentals at all. Waldron of course concedes that there is not unanimity on these principles, stating only that "these matters are more or less settled."[44] But this is a significant concession, and it seems to imply that ultimately his claim is that such principles *should be* fundamental and beyond dispute. That amounts to the proposition that persons should be prevented from communicating because in our view they have nothing of value to say.

PM: Let me turn to a specific example involving "hate speech." In Budapest in 2008, extreme right-wing Internet sites encouraged "counter-demonstrators" to block the gay pride parade, by force if necessary. At the parade itself, "counter-demonstrators" were throwing rocks, acid-filled eggs, and bottles when they could get close enough, and many of them were shouting homophobic and anti-Semitic epithets. Let's assume that at the parade some people did not call for stopping the parade, by force if necessary, or for physically hurting participants of the parade, but they did express their homophobic and racist ideas. Would, or should, such speech be protected under *Brandenburg*?[45]

RP: It would be helpful closely to parse the case that you put. First, there are marchers who wish to express their point of view, which concerns pride in gay culture. Presumably their message is that gay culture should be accepted in Hungary. The parade is in this sense the public expression of an idea. A central principle of freedom of speech is that the state cannot suppress expression of an idea in public discourse merely because it disagrees with that idea. This principle follows from the thought that public discourse is the medium within which democratic will is formed, so that if the state were to control which ideas could be expressed in that medium, it would no longer be responsive to a democratic will. The right to express this controversial idea in the parade should therefore be protected.

Second, a parade is not simply words. It is not abstract text. It is a material manifestation that can cause physical effects, like trash, traffic jams, noise, and so on. Most communicative acts have physical dimensions of this kind. Loudspeakers cause sound, movie houses cause congestion and fire hazards, newspapers cause litter, DVDs consume chemicals, and so on. How the necessary physical dimensions of communication can be regulated without compromising freedom of speech is a continuous and complex problem. In the context of parades, this problem includes

[44] *Id*

[45] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (holding that speech advocating violence or lawlessness is constitutionally protected "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

how parades can be reconciled with traffic control, pedestrian safety, commercial and other usages of street space, and so on. On the constitutional side of the question is the importance of persons being able to deploy the medium of parades in ways normatively regarded as integral to the formation of public opinion.

Third, the message I convey in my parade or speech may provoke others to violent acts. The question posed here is whether the costs caused by speech – the negative reactions and effects – should be internalized by the speakers. Because participation in public discourse is so precious, we typically do not permit hecklers' vetoes.[46] The state protects the right to speak, even if private citizens who detest the speech seek to suppress it. Nevertheless, this presumption, like all default positions, has limits. At some point the state is justified in suppressing speakers if their speech will cause extreme and unavoidable harm to themselves or to others. Where this point is reached is a judgment call. If the state is too quick to suppress the speaker, we may be suspicious that the supposedly paternalist intervention is merely an excuse for siding with those who oppose the speaker. And yet the state is also derelict if it ignores the safety of the speaker altogether.

In the situation you propose, the counterdemonstrators have as much right as the initial paraders to voice sentiments, even unpopular sentiments that disagree with the marchers. They have every right to oppose gay rights. They have every right to show up and shout homophobic slogans. Just like gay persons have every right to burst forth from the closet and demand acceptance, so those who oppose gay rights have every right forcefully to assert that they do accept gays. There is a real public controversy between these two groups.

It follows that the state cannot suppress the anti-parade demonstrators on the ground that the state disagrees with their message, just as the state cannot stop the parade on the ground that the state disagrees with *its* message. The state must be neutral as between these messages. An antipathy to hate speech would not seem particularly helpful to me in guiding the state in how to proceed. What the state does need to do is to ensure that both sides of this demonstration can peacefully express their opinions. In doing so the state has the obligation of preserving the peace and of constraining those who would violate the peace. How in the end this must be done is a highly contextual question of judgment. But antipathy would seem to me to have little to do with it.

PM: Even if the "counter-demonstrators" would deny equal citizenship?

RP: The question of what does and does not constitute equal citizenship is itself a question of political opinion. Those who argue against naturalizing undocumented immigrants are taking a position about equal citizenship, yet it is also a position

[46] That is, we do not empower a hostile audience to silence a speaker through their very hostility and the harm or violence it threatens to produce. See Harry Kalven, Jr., *The Negro and the First Amendment* 140 (Ohio State University Press 1965).

in an ongoing political controversy. The question of which sexual practices should be regulated and which should be constitutionally immune from regulation is similarly a question about the political constitution of the state. For this reason, the counterdemonstrators should be entitled to express their message of disapproval.

If we assume, as might perhaps be inferred from your statement of the case, that the goal of the counterdemonstrators was not to express a message but to intimidate and harm participants in the gay parade, then we no longer have a symmetrical question of two parties each wishing to influence the formation of public opinion by conveying a message. Instead we have a question of one party wishing to communicate and a second party wishing through violence to prevent this communication. Nothing in the theory of freedom of speech would prevent the suppression of the latter. We would conceptualize the counterdemonstrators as attempting to commit a crime. The state is justified in preventing that crime. That the crime is expressive would no more implicate freedom of speech than would the attempt of the perpetrators of 9/11 to communicate a message immunize their crime under the First Amendment.

In short, it is one thing to have a counterdemonstration that seeks to convey a message, however hateful, and it is quite a different thing to use force and violence to prevent someone from speaking. There is no question at all that the state may and should prohibit the second.

PM: Sure, but what about "counter-demonstrators" who are engaged only in speech, but are expressing their views in a setting, in a context, when doing so directly and potentially decisively contributes to creation of the imminent danger of violence? Some people might not engage in violence except if they were encouraged to do so, either by Web sites urging that the parade should not be allowed to happen by any means necessary or by others on the spot, who might or might not be engaged in *express* incitement to violence.

RP: One question you may be now asking is when advocacy of illegal action can be regulated as illegal action. This is not a question that is unique to hate speech. It occurs in innumerable contexts. In the United States, we have for several generations subsumed this question under the so-called *Brandenburg* test that you mentioned earlier, which holds that the state cannot "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[47]

The reason we require such a strict connection between advocacy of illegal action and illegal action is that we have learned through bitter experience that it is quite easy for a state to postulate some causal connection between speech and subsequent illegal conduct, however attenuated, and to use this connection as a pretext for suppressing speech which it wishes to silence because it disagrees with its content. During World War I, the United States Supreme Court, per Justice Holmes, allowed

[47] *Brandenburg*, 395 U.S. at 447.

speech to be suppressed if it merely had the "tendency" to cause future illegal conduct, and on this ground the state savagely suppressed the expression of all kinds of antiwar sentiments.[48] From the perspective of the United States, therefore, the question is whether the counterdemonstrators in your example would pass or fail the *Brandenburg* test.

Your example raises real difficulties in the theory of freedom of speech. There are many ambiguities that course through the case law. The *Brandenburg* test requires judgments that are necessarily discrete and contextual, and so subject to abuse. And while courts without a doubt read the relationship between speech and violence with an eye to how acceptable they find the speech,[49] this suggests that judicial judgments are made by fallible human beings. As a general matter, however, I cannot see how these difficulties are connected to the question of hate speech. I do not see why we would not apply in the context of hate speech the same rules for connecting speech to illegal conduct that we would apply in any other context.

PM: A possible reason for special rules for connecting speech to illegal conduct in the context of "hate speech" may be that such speech can create imminent danger of violence even if the speaker claims that he/she did not intend to incite those actions; he/she only wanted to express his/her opinions. How would you conceptualize the connection between speech and the imminent danger of the sort we are talking about that speech can create or directly and decisively contribute to?

RP: Analogous difficulties are created in all situations in which the *Brandenburg* test applies. It used to be said that the speech of even insignificant communists was like a spark that carried the potential of igniting the flame of revolution. I fail to see why hate speech presents a situation that is uniquely complicated.

PM: This discussion supports the view that, as you said earlier, responses to "hate speech" should be contextual. Given that perspective, do you think it would be possible to develop international standards for the regulation of "hate speech"?

RP: I myself tend to be skeptical toward efforts to implement universal standards. Universal standards tend to be articulated at such a high level of abstraction, and to be filled with so many exceptions and qualifications, as to lose the capacity to guide and control state action. In my view, the impulse to regulate hate speech, and the degree of immunity it will claim from regulation, will depend upon such particular and historical circumstances as the need of specific countries to ensure freedom of speech to underwrite democratic legitimation. The greater the need of a nation for mechanisms of democratic legitimation, the more freedom of speech it will allow.

[48] *See, e.g.*, Debs v. United States, 249 U.S. 211 (1919).

[49] *Compare* NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982), *with* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992), *and* Virginia v. Black, 538 U.S. 343 (2003).

We should also recognize that the significance of rules of civility will vary from country to country. The fundamental diversity in the nature and meaning of civility rules has been demonstrated by my colleague Jim Whitman.[50] The need to allow freedom of speech will always be balanced against the need to enforce civility rules, and these balances will work themselves out differently in different countries. The balance will necessarily be path-dependent and particular.

PM: Could there be a universal definition of "hate speech"?

RP: We can always construct a definition. The question is whether the definition will do any work. In law, we have to define hate speech carefully to designate the forms of the speech that will receive distinctive legal treatment. This is no easy task. Roughly speaking, we can define hate speech in terms of the harms it will cause – physical contingent harms like violence or discrimination; or we can define hate speech in terms of its intrinsic properties – the kinds of words it uses; or we can define hate speech in terms of its connection to principles of dignity; or we can define hate speech in terms of the ideas it conveys. Each of these definitions has advantages and disadvantages. Each intersects with first amendment theory in a different way. In the end, any definition that we adopt must be justified on the ground that it will achieve the results we wish to achieve.

PM: There can be many definitions then. If so, are all of them arbitrary?

RP: Any definition of "hate speech" will be constructed to serve a particular purpose. We must evaluate the status of "hate speech" so defined in order to determine whether it achieves what we wish to accomplish and whether the harms of the definition will outweigh its advantages.

PM: Toby Mendel argues that Articles 19 and 20 of the International Covenant on Civil and Political Rights could be the basis of a consistent standard, though courts are not clearly interpreting these provisions.[51]

RP: I am skeptical that these Articles in fact articulate a useful standard. If we look only at Article 19, for example, what is "the freedom of expression"? Is it the right of a student to talk in class regardless of the instruction of her teacher? Is it the right of a lawyer to talk in court regardless of the instructions of a judge? Article 19 contains such general language as to be practically useless. In order to determine the actual parameters of "freedom of expression," we will have to define the values served by freedom of speech, and these values will invariably become context specific.

[50] James Q. Whitman, "Enforcing Civility and Respect: Three Societies," 109 *Yale L.J.* 1279, 1383–90 (2000).

[51] Toby Mendel, "Does International Law Provide For Consistent Rules on Hate Speech?," Chapter 22 herein.

To take another example, Article 19 requires freedom of speech "regardless of frontiers."[52] What does that mean? If freedom of speech is, as I suggest, logically and sociologically connected to democratic self-determination, how can its regulation be separated from the units of self-determination? Almost all international statements I have seen suffer from immediate and obvious deficits of this kind. They join together goods that are in tension and assume that all is well. They are very nice in the abstract, but in the concrete world of law they do not seem to me to provide much analytic clarity, precision, or guidance.

Article 20 suffers from analogous ambiguities. To know how to interpret Article 20, one would need a persuasive theory of meaning of words like "hatred" and "incitement" and "hostility." As we interpret these words differently, so Article 20 will come to be more or less in tension with other principles of freedom of speech.

PM: You emphasized that education specifically should contribute to sustaining the deeper structures of democracy. What sort of educational policies would you suggest?

RP: Amy Gutmann has a good discussion of this question in her book *Democratic Education*.[53] Democratic education is necessary in order to sustain our commitment to and understanding of the value of democratic self-government. It is necessary in order to inculcate the practical virtues that democratic citizens must exercise if democracy is to succeed. These virtues include sustaining the balance between toleration and self-authorship; maintaining faith in the long-run dependence of state policy upon evolving public opinion despite short-run defeats; balancing national imperatives against local needs and values; affirming the priority of civilian authority as against the temptations of military force; prizing peaceful transitions of power; protecting freedom of speech; and so on. There are innumerable necessary democratic virtues that we take for granted. All are premised on the belief that a stable democratic polity is of fundamental value and must be preserved. This belief doesn't come from God, from human rights instruments, from natural law, or from nature. It comes from community commitments that instilled through socialization and education.

Public education in a democracy takes many forms. There is primary socialization, which occurs in the family and in elementary institutions of education. There is the continuous education of the state, which occurs through public education, public monuments, art, prizes, stamps, and street names. There is the peer-to-peer education that occurs through forms of civic engagement. And so on.

[52] Section 2 of Article 19 provides: "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice." International Covenant on Civil and Political Rights, art. 19(2), December 16, 1966, 999 U.N.T.S. 171.

[53] Amy Gutmann, *Democratic Education* (Princeton University Press rev. ed. 1999).

PM: Would it be acceptable if the U.S. government gave awards for the best achievement in the last year in the struggle against prejudice and the promotion of diversity?

RP: Of course. Restraints on what the government chooses to praise are chiefly political. We give prizes for cultural achievement at the Kennedy Center; we give prizes for essays on a many different topics; we award research grants; we endow lectures, and so on. Courts do not typically review such activities.[54]

PM: Law, too, can be educative. Some defend the prohibition of "hate speech" on the ground that it has considerable educational value, instructing the public about certain important virtues.

RP: It is entirely true that law is educational.[55] But law is not *only* educational. The law also regulates and controls behavior. Thus the criminal law not only expresses society's extreme condemnation and abhorrence of certain conduct, it also uses the state's monopoly on legitimate violence to prevent that conduct. It does this through stigmatization as well as punishment. If law were merely expressive, then it would make sense to regard hate speech regulation as a form of public education. On this view, hate speech regulation would do no more than express our society's abhorrence of intolerance and bigotry. It would teach health lessons in social respect and solidarity. Hate speech regulation would be no different than a president's exhortation to mutual respect.

But because law is much more than merely expressive and educational, because it is also punitive and regulatory, the view you describe does not rest on an adequate account of hate speech regulation, which also penalizes participation in public discourse by those who hold certain views condemned by the state. This not only sends a message of intolerance – that those who believe certain ideas are not welcome within processes of public opinion formation – but it also undercuts democratic legitimation with respect to such persons. It stands as an open invitation to exclude from public-opinion formation those who hold views that a majority believes should be beyond the pale. These are very dangerous and costly moves in a democracy. The expressive message of hate speech regulation is thus very complicated. It can breed intolerance as easily as tolerance; it can promote resentment and social instability as easily as it can promote solidarity and respect. The actual effects of hate speech regulation will be highly contextual, depending upon national traditions, histories, and so forth.

PM: One last question about education, connecting the need for education and the need for the cultural preconditions for legitimacy through public discourse. To

[54] Post, *supra* note 5; National Endowment for the Arts v. Finley, 524 U.S. 569 (1998).

[55] Robert Post, "The Social Foundations of Privacy: Community and Self in the Common Law Tort," 77 *Cal. L. Rev.* 957 (1989).

what extent can countries like Hungary create these preconditions by developing history books that can support a common sense of history?

RP: One cannot create collective memory merely by writing excellent history. But certainly excellent history is a helpful aid in the creation of a stable narrative of collective memory. I tend to think that stable historical narratives both depend upon a healthy respect for facts and upon a compelling and perhaps non-historical sense of the meaning of facts. If the political victors in Hungary can change the facts and the significance of those facts every few decades, the nation cannot establish a coherent narrative about its fundamental values. Respect for facts thus cabins the efforts of the state unscrupulously to manipulate history.

PM: Since Hungary became democratic in 1989, it should be able to develop a common sense of history, including an at least largely shared interpretation and conceptualization of our history in the last century.

RP: That would be wonderful.

PM: Suppose *two* countries are involved; for example, consider the Israel/Palestine conflict.

RP: Israel and Palestine have two different historical narratives. Dialogue between Israel and Palestine is complicated by the difficulty of persons talking to each other out of two entirely distinct historical frameworks that create incompatible visions of justice and of the future. There is no easy or simple solution to that problem.

PM: Slovakian and Hungarian historians and history teachers have also been working for years on common history books in which they try to harmonize their distinct national narratives.

RP: That's very hopeful.

PM: A standard argument for leaving "hate speech" unregulated is that the most effective response is more speech. But it raises the question whether the state should go further than engaging in counterspeech; should it encourage and facilitate private counterspeech? Katharine Gelber argues that the state and the political community of a country should enable members of the targeted minority – say, Roma in Hungary – to answer forcefully.[56] What do you think about this argument?

RP: It depends on exactly what this argument means. Should the president of Hungary speak out against anti-Roma hate speech? Of course. Should the Hungarian parliament speak out against such hate speech? Of course. Should the Hungarian prime minister? Of course. I can't think of any argument against the state participating in the formation of public opinion in this way. It is a separate question

[56] Katharine Gelber, "Reconceptualizing Counterspeech," Chapter 11 herein.

what it might mean for the state to "facilitate" the speech of the Roma themselves. Much would depend upon the exact steps taken. So, for example, to permit Roma to use public fora but to prevent their opponents from using the same fora would be quite problematic. Yet for the state to offer remedial assistance to groups otherwise excluded from public discussion would present an entirely different question.

PM: What do you make of Charles Lawrence's suggestion that when racist, or homophobic, or religiously bigoted speech occurs at a university, then the whole university must react? That proposition can be analogized to the idea that the whole state has to do something.

RP: There is a sense in which I regard Lawrence's observation as correct, and a sense in which I regard it as very misguided. It seems right to me that a university is a community and it must defend itself as a community. Racist attacks within a university are the concern of the entire community, and those who speak for the community have an obligation to defend it by articulating the values proper to the community. But if universities were to be held "responsible" for the speech of their members, there could be no academic freedom.[57] If a university were to be held accountable for the ideas and expressions of its members, it could not cede to its faculty or students the freedom to think independently, and this independence is required by the very idea of a university. So in most cases a university should not be held accountable for the racist speech of its faculty or students (as distinct from its administrators), but at the same time a university must assume the responsibility for ensuring the conditions of mutual respect and safety necessary for the functioning of a university. By analogy, no state that imagines itself as democratically responsive to public opinion can assume responsibility for what is said within public discourse. Nevertheless, any democratic state must ensure that public discourse remains sufficiently civil as to perform its function of democratic legitimation.

PM: What about the argument that restricting alleged defamation of religions is necessary in order to protect religious sensibilities? Under your model of public discourse, how could we deal with the challenge posed by religious sensitivities?

RP: Religious sensitivity is fast becoming an increasingly salient problem in Europe. In my view, however, there should be no structural difference between our analysis of speech that is defamatory of groups (racist speech) and speech that is defamatory of religions (blasphemy). There are some very early and very poor opinions by the European Court of Human Rights[58] that seem to imply that speech offensive to religious sensibilities can be suppressed as blasphemy, but these opinions would seem to cede control of public opinion formation to religious groups, and in a civil society

[57] *For the Common Good: Principles of American Academic Freedom* (Matthew W. Finkin & Robert C. Post eds., Yale University Press 2009).

[58] See Robert Post, "Religion and Freedom of Speech: Portraits of Muhammad," 14 *Constellations* 72 (2007).

that is not defensible. It makes little practical sense because religious sensibilities can be, and indeed frequently are, logically incompatible with each other. What offends Catholics does not offend Muslims, and vice versa. Sometimes what is offensive to one religion is affirmatively necessary to another. Oliver Cromwell famously issued a directive regarding the religious liberty of the Catholics in Ireland: "As to freedom of conscience, I meddle with no man's conscience; but if you mean by that, liberty to celebrate the Mass, I would have you understand that in no place where the power of the Parliament of England prevails shall that be permitted."[59] For these reasons, any test that would seek to determine the acceptability of public speech by reference to subjective religious sensibilities would instantly entangle itself in absurdities and self-contradictions of the worst kind. The test for the acceptability of public speech must in the end turn on a neutral secular standard.

PM: The United Nations General Assembly and Human Rights Council still approved resolutions aimed at "combating defamation of religions."[60]

RP: I confess I don't understand the meaning of such a resolution. If I say that Jesus Christ is the only true God, the statement could simultaneously affirm my deepest faith and defame Islam. An international standard of defaming religion would instantly lead to heated internal contradictions.

PM: Hopefully our global community will not restrict freedom of speech in such an absurd way.[61] Thank you so much for the interview.

RP: Thank you, Peter.

[59] McDaniel v. Paty, 435 U.S. 618, 631 n. 2 (1978) (Brennan, J., concurring) (quoting Oliver Cromwell).

[60] *See, e.g.*, UN General Assembly, Office of Public Information, Press Release GA/SHC/3966, *Third Committee Approves Resolution Aimed at "Combating Defamation of Religions"* (November 12, 2009), *available at* http://www.un.org/News/Press/docs/2009/gashc3966.doc.htm. The Resolution passed by a vote of 81 to 55, with 43 abstentions. *Id.* The United States voted against the Resolution "because it would not agree that prohibiting speech was the way to promote tolerance." *Id.* Support for this resolution has weakened over the years. It was approved again in March 2010, but by the narrowest margin to date. U.N. Human Rights Council, Res. 13/16, Rep. of the Human Rights Council, U.N. Doc. A/65/53 (Mar. 25, 2010). The vote was 20 to 17, with 8 abstentions.

[61] In 2011, the Human Rights Council adopted a resolution condemning violence, discrimination, and incitement to religious hatred without reference to "defamation of religions." U.N. Human Rights Council, Res. 16/18, Rep. of the Human Rights Council, A/HRC/16/2, chap. I (Mar. 24, 2011). *See also* Robert Evans, "Islamic Bloc Drops U.N. Drive on Defaming Religion," Newsmax.com, Mar. 24, 2011, *available at* http://www.newsmax.com/Newsfront/article/2011/03/24/id/390671.

2

Is There a Case for Banning Hate Speech?

Bhikhu Parekh

During the past few decades, there has been an almost universal trend toward banning so-called hate speech directed at individuals or groups on the basis of their race, ethnicity, nationality, or religion. The prohibited forms of expression vary from country to country, but the basic thrust is the same. Britain bans abusive, insulting, and threatening speech, Denmark and Canada prohibit speech that is insulting and degrading; and India and Israel ban speech that incites racial and religious hatred or is likely to stir up hostility between groups. In the Netherlands, it is a criminal offense to express publicly views insulting to groups of persons. Australia prohibits speech that offends, insults, humiliates, or intimidates individuals or groups, and some of its states have laws banning racial vilification. Germany goes further, banning speech that violates the dignity of an individual, implies that he or she is an inferior being, or maliciously degrades or defames a group.

Many of these countries claim to be guided by or find support in the International Covenant on Civil and Political Rights, particularly Article 20, which requires a ban on "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination."[1] Some of them are also signatories to the International Convention on the Elimination of All Forms of Racial Discrimination, Article 4 of which requires parties to "condemn all propaganda or organisations based on theories of racial superiority and incitement to racial discrimination and acts of violence" and to eradicate "all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing

[1] International Covenant on Civil and Political Rights, art. 20, G.A. Res. 2200 (XXI), U.N. GAOR 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966).

An earlier version of this chapter was published under the title "Hate Speech," 12 *Public Policy Review* 213 (2006).

laws will not examine it too closely. However, when the position is scrutinized, there is a precipitate retreat by its main proponent to a much more moderate claim – hate speech laws may diminish the legitimacy of downstream laws (or they may lead to something of a "deficit" in legitimacy) even though they do not "spoil" the legitimacy of these laws altogether. Indeed, under pressure, the retreat is to a claim that may be of vanishing significance in relation to laws of the kind that we are realistically considering and actual public debates of the sort in which such laws typically intervene. Think of this chapter, then, as an exercise in resistance to browbeating. There may be a case to be made against hate speech laws, but it needs to be made with greater care than this.

17

Reply to Jeremy Waldron

Ronald Dworkin

Professor Waldron believes that I beat a "precipitate retreat" from an earlier position in an email to him commenting on an argument he made.[1] He has called my "bluff" and resisted my "browbeating." I did not intend the email for publication, but I cannot find any retreat there. I had said, in the "Foreword" Waldron cites, that a law criminalizing "hate" speech "spoils the democratic justification we have for insisting that everyone obey."[2] I said, in the email Waldron decided to quote, that such laws leave us with "something morally to regret" and with "a deficit in legitimacy." In an earlier book Waldron cites, I said that legitimacy is a matter of degree, and that not every law that is "spoiled" by a defective democratic process justifies citizen rebellion.[3] Claiming that an opponent has retreated is often a useful rhetorical device, but it seems unpersuasive in this case. We can hardly justify a defect in political legitimacy by arguing that it might have been worse.

Waldron appears to accept, at least in this essay, that it is indeed a defect in legitimacy to enforce legislation against those who were not permitted to speak in opposition during the political process that produced that legislation, that this does "spoil" the democratic pedigree of the legislation to some degree. If the legislation in question required everyone to carry health insurance, for example, then suppression of even "vituperative" dissent would put the legitimacy of that law "in question." He thinks hate speech different, apparently, for two reasons. One of these – that issues of racial dignity have been settled in mature democracies – is doubtful, and Waldron offers it with what seems great hesitation. Well he might: These issues seem much less settled now – in Germany and the Netherlands, for example, as well as in Britain and the United States – than they seemed decades earlier. The other reason Waldron

[1] *See* Jeremy Waldron, "Hate Speech and Political Legitimacy," Chapter 16 herein. All references to Waldron are to this chapter.

[2] Ronald Dworkin, "Foreword," in *Extreme Speech and Democracy* 1, 1 (Ivan Hare & James Weinstein eds., Oxford University Press 2009).

[3] Ronald Dworkin, *Is Democracy Possible Here?* 9–10 (Princeton University Press 2006).

offers is interesting, however; it touches a very deep issue in political philosophy. What is the basis of the "equal concern and respect" that coercive government owes those who fall under its dominion?

Waldron seems to assume that *government* owes equal concern and respect to all members of the political community because every *member* of the community does, even as a private individual. He suggests that racists dissent "from the broad abstract principle that individuals must show equal concern and respect to all members of the community." Given that we ourselves accept that principle, Waldron argues, the phenomenon of hate speech requires balancing. On the one hand, government does compromise legitimacy – it fails to treat racists with the kind of respect any justification of democracy assumes – when it obstructs their participation, on their own terms, in the democratic process. In that sense, hate speech is like vituperative opposition to health care legislation: In both cases, censorship would compromise legitimacy. But hate speech is different because vituperative hate speech also denies some citizens – its targets – the equal concern and respect they are entitled to have *from other citizens*. So balancing is necessary: Censorship of the worst forms of hate speech, at least, is justified on balance because the damage such speech does to the respect owed its targets outweighs the damage done to racists by compromising their democratic rights.

But the "abstract principle" that supposedly grounds this argument is mistaken: It fails to notice the crucial difference between the rights and responsibilities of government – our responsibilities when acting collectively and coercively in politics – and our responsibilities as individuals operating within the structure of coercive law. Government must treat the fate of each citizen as of equal importance. But I need not: I do not owe you or your children the concern, when I act as an individual deploying my own resources, that I show to my own children or to myself. Government may not adopt any ethical conviction – any opinion about the true basis of human dignity – and enforce that view against dissenting citizens. It must recognize a right of ethical independence. But recognizing that right means that no individual citizen may be forced to accept any official ethical conviction or be prevented from expressing one's own dissenting convictions. It is a popular view, for instance, that atheists cannot be trusted because they have no beliefs that can ground a moral commitment. I find that opinion deeply offensive because it denies my status as a moral agent, and moral agency is a matter that, as Waldron puts it, "people rely on comprehensively and diffusely in almost every aspect of their dealings with others." No law would be acceptable, no matter how popular, that rested on that ethical opinion. But I have no right that others, who *do* believe I lack that basic dignity, not hold or express that conviction as individuals. Living in a just society – a society whose government respects human dignity – means that I must accept the right of others to hold me in contempt.

So regulating hate speech is not, after all, a matter of balancing. Government may not violate the rights of any citizen to the ethical independence from government that dignity requires. It is no excuse that it does so to enforce a particular collective opinion about what forms of respect individual human beings owe one another just as human beings; that "excuse" only confirms the mistake. I myself believe that one opinion about that latter issue is correct and others mistaken. But it does not lie within the powers of just government to try to identify and impose that truth.[4] To be sure, life would be more pleasant for some members of the community – and less pleasant for others – if government had that power. But a government is not fully legitimate that claims it.

I have some other, less central, comments about Waldron's essay. I agree with him, first, that my argument does not suppose that "laws against racial violence or criminal damage" are in any way compromised when expressions of racial hatred are banned. I do not, however, understand why he thinks they might be. He suggests, second, that censorship of "hate" speech is comparable to "time, place, and manner" restrictions on political demonstrations. But the latter are permissible only when they are, as constitutional lawyers put it, "content-neutral."[5] Justifications for time, place, and manner restrictions are not based on any judgment, as censorship of race speech must be, that the speech restricted is false or offensive.

I am surprised, third, that he seems to argue only for banning the crudest forms of hate speech: speech that declares that some people are no better than the animals "we would normally seek to exterminate, like rats or cockroaches." That is not the danger; no person or political party that hoped to attract support or attention would speak in that way. If Waldron's case for censorship of hate speech is to count in actual politics, it must reach what is actually said and feared. "The holocaust was invented by Jews for their own advantage." "Moslems are all terrorists who should be shunned." "Islam has contributed nothing of value to the world's culture." "The immigration of alien races will destroy the indigenous culture that we, who have developed and embraced that culture, have a right to protect." "They should all be sent back where they came from." None of these misbegotten declarations implies that any human being is no better than an animal or should be exterminated like a cockroach. None implies that anyone inherently lacks the status or dignity of a human being. Any argument that hopes to defend the hate speech laws actually in force in European countries must defend censorship of the kind of speech that is actually used to inspire hatred.

Europeans have said to me, on many occasions, that their history is different from and darker than that of the United States, and that if I had been born in Europe, I would share their opinion rather than the reflex First Amendment tic they think an

[4] In *Justice for Hedgehogs* (Harvard University Press 2011), I argue for what I take to be the correct account of what kind of respect people owe each other as individuals, and I describe what I believe to be the ethical, moral, and political consequences of that view. But I also argue there, at some length, for a right of personal independence from coercive government in the ethical as distinct from the moral sphere.

[5] E.g., Ward v. Rock Against Racism, 491 U.S. 781, 796–4 (1989).

American disease.[6] They may be right about the impact of history on conviction: A great many distinguished and otherwise liberal European political philosophers do support censorship in this area, although of course others do not. In any case, however, explanation of a conviction's genesis is not an argument for its truth.

[6] Stephen Holmes's comments in this volume take something of the same view. See Stephen Holmes, "Waldron, Machiavelli, and Hate Speech," Chapter 18 herein.

18

Waldron, Machiavelli, and Hate Speech

Stephen Holmes

I

I am not particularly knowledgeable about the subject of hate speech. I am not a philosopher at all. Yet Peter Molnar has pursued me persistently to contribute to this project. I could not understand why he kept calling me up and sending me emails telling me I should speak on a subject I know nothing about. I finally realized that the answer had to be that I once bumped into him at Washington Square Park and we had a conversation about hate speech.

That conversation took us back to the mid-1990s, when I heard Ronald Dworkin lecture in Budapest. Dworkin was speaking, of course, a few hundred miles away from the Balkan tragedy, where hundreds of thousands of people were killed on the basis of violent hate ideologies, and on a continent in which a hundred million people were killed in that century on the basis of violent hate ideologies. My recollection is that he argued for total freedom to express hatred of other people, without considering this context.

It does not take Sigmund Freud to understand that, if you have two continents, in one of which one hundred million people were killed on the basis of highly violent hate ideologies, accompanied and propelled by extreme hate speech, and in the other of which, at least by comparison, basically nothing happened, you will get different judicial traditions. This is not a *legal* point; it simply reflects the fact that what drives people most in their judgments is their own experience – or, to be precise, their remembered experience. When you forget about the Great Depression, then you say, "Well, government doesn't need to regulate the banks anymore." When you forget about the Vietnam War, you can say, "We should go over to Iraq." So, what you remember – your experience – is far more consequential than norms or philosophies.

This is a revised transcription of remarks delivered on March 25, 2009, at the Cardozo School of Law, largely as a response to a presentation by Jeremy Waldron based on his chapter in the current volume.